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No. 82-940.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

ELIZABETH ANDERSON HISHON,
PETITIONER,

v.

KING & SPALDING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Brief of the Women's Bar Association of Massachusetts as Amicus Curiae.

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I. INTRODUCTION

The Women's Bar Association of Masschusetts, appearing as amicus curiae with the consent of both parties, supports the position of Petitioner Elizabeth Hishon that law-firm partnership decisions are covered by the protections of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. To exempt such decisions from Title VII coverage would be to carve out an exception to that statute's broad mandate of equal opportunity which is completely unjustified.

II. INTEREST OF AMICUS CURIAE

The Women's Bar Association of Massachusetts ("WBA") is an organization of women attorneys committed to improving the status of women in the legal community. The WBA was formed in 1978 in response to the rapid increase in the number of women admitted to the bar in Massachusetts. Currently, the

WBA membership is close to 500; many other women attorneys who are not members participate in WBA programs and activities. The WBA has a different focus from other established bar associations because the majority of its members are newer attorneys. As of 1982, 76 percent of the WBA members were admitted to practice in 1977 or later.

The relatively recent admission of most WBA members forms the basis of much of the organization's particular interest in this case. Because they are newer members of the bar, many women attorneys in larger law firms have not yet reached the point at which they will be considered for partnership.[1] That point, however, is quite close in the careers

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1. In the area served by the WBA, partnership decisions are made usually seven to ten years after an attorney has entered a firm.

of many members. Thus, these members have an interest in seeing that they receive the full protections of all laws which protect them from discrimination on the basis of sex when partnership decisions are made.

Members of the WBA who are not yet directly affected by partnership decisions also have an interest in making certain that law firms are covered by Title VII in partnership decisions. The treatment of women by law firms has a direct effect on how women attorneys are perceived in general. Until hiring and partnership opportunities for women in law firms exist on an equal basis with those for men, women in all forms of practice will not be viewed as equal to men, but will be seen as outcasts who could not "make it" in firms. Therefore, all the members of the WBA, regardless of the kind of practice in which they are enaged, have an interest in promoting equal opportunities in law firms. Therefore,

the WBA urges this Court to reverse the decision of the Eleventh Circuit exempting partnership decisions from Title VII.

III. SUMMARY OF ARGUMENT

Although women are becoming lawyers in much greater numbers, they are still underrepresented in the ranks of partners in law firms (pp. 5 - 10). Title VII's anti-discrimination purpose should be interpreted broadly to cover partnership decisions. (pp. 10-13). Because partnerships are like other"employers" and partners like other "employees" covered by the statute, law firm partnerships should not be exempt from Title VII coverage. (pp. 14-24). In addition, partnership can be viewed as an employment opportunity or a term of employment (pp. 24-28). Partnership decisions are amenable to judicial scrutiny, and the subjective nature of partnership decisions is not sufficient to

exclude them from the application of Title VII. (pp. 28-32).

IV. ARGUMENT

A. BACKGROUND: WOMEN ARE UNDERREPRESENTED IN LAW FIRMS.

Although the number of women practicing law has grown tremendously in the last decade, women partners in law firms are still extremely rare. The number of women partners does not reflect the proportion of women to the general population of lawyers.

Since 1970, the percentage of women in the law has increased dramatically. In that year, women comprised only 3 percent of lawyers;[2] the 1982 figures show women as 10-12 percent of the profession nationally.[3] In Massachu-

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2. American Bar Foundation, The 1971 Lawyer Statistical Report 5 (B. Sikes, C. Carson & P. Gorai eds. 1972)

3. See "Law Firms and Lawyers With Children: An Empirical Analysis of Family/Work Conflict," 34 Stan. L.R. 1263 n.5 (1982) (sets figure at 10 percent); Epstein Women in Law 4 (1981) (sets 1980 figure at 12 percent).

setts, the percentage of women is even higher. Out of 17,522 Massachusetts attorneys, 3,252, or 18.5 percent, are women.[4]

Law school figures reflect that this trend towards increasing numbers of women in the law will continue. Between 1969 and 1979, the number of women law students increased more than 700 percent.[5] In 1980-1981, approximately 35% of all law students were women.[6]

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4. Telephone conversation with staff of Massachusetts Bar Association, February 11, 1983.

5. See White, Law School Enrollment Continues to Level, 66 A.B.A. J. 724, 725 (1980), as cited in "Ethical Issues Facing Lawyer-Spouses and Their Employers," 34 Vand. L.R. 1435 and n.3 (1982).

6. See "Lawyers With Children", supra, at 1264 nn. 6-7.

The growth in the numbers of women lawyers is encouraging. The situation for women in law firms, however, is not as positive as the trend towards greater representation in the profession as a whole. Until the 1970's, many firms were reluctant to hire women lawyers, and it is only recently that larger firms in major cities have begun to employ women in sigificant numbers.[7]

Women partners in law firms are still a rarity. Their numbers and proportions are smaller than their percentages in the entire profession would merit. In 1980, there were 85 women partners out of a total of 3,987 partners in the top 50 law firms in the country, or 2.1 percent.[8] That same year, the number of women partners in New York's 21

7. See Epstein, supra, at 175-218 for a discussion of the history of discrimination against women lawyers in firms.

8. Epstein, supra, at 179.

largest law firms was 36.9 A tally of the women partners in Boston law firms with 15 or more lawyers in 1983[10] shows 53 out of a total of 1121, or 4.7 percent.[11]

More disturbing than the modest number of women partners, however, is the considerable number of law firms with no women partners. In 1980, more than 25 percent of large New York law firms had no women partners.[12] The 1983 figures for Boston show that more than

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9. Hoffman Lions of the Eighties 212-213 (1981).

10. Fifteen employees is the minimum number for Title VII coverage. 42 U.S.C. §2000e(b).

11. Figures were derived from listings in III Martindale Hubbell Law Directory (1983). Two law firms with over 15 lawyers did not distinguish between partners and associates in their listings; these firms were not included in the compilation.

12. Epstein, supra, at 179.

40 percent of the firms of 15 or more lawyers have no women partners. Even if partnership decisions are made six to ten years after a lawyer enters a firm,[13] these low numbers in the partnership ranks are not justified by the number of women entering the profession in those past years.[14]

Given this background of underrepresentation of women at the partnership level, it is crucial that all avenues for protecting women from discrimination on the basis of their sex remain open. Title VII provides protections against such arbitrary discrimination which should be available to women

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13. See Epstein, supra, at 202.

14. For example, the percentage of women in law school in 1969 was 6.9 percent; 1970 - 8.5 percent; 1971 - 9.4 percent; 1972 - 11.9 percent; 1973 - 15.8 percent; 1974 - 19.7 percent; 1975 - 22.8 percent; 1976 - 25.5 percent. See White, supra, at n5.

lawyers, whatever their level of career accomplishment.

B. TITLE VII SHOULD BE INTERPRETED BROADLY TO PROTECT AGAINST ALL FORMS OF SEX DISCRIMINATION IN EMPLOYMENT.

The purpose of Title VII is to protect women and minorities from all forms of arbitrary discrimination in the workplace. Both the language and intent of Title VII is broad enough to encompass partnership decisions within its protections.

Title VII makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . .or;
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2.

The aim of this broad statute was to give every person equal job opportunities. Thus, Title VII has been interpreted to bar both discrimination which is intentional and discrimination which is the result of facially neutral policies having a disparate impact upon women or minorities. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). "Every individual employee is protected against both discriminatory treatment and against 'practices that are fair in form, but discriminatory in operation' ". Connecticut v. Teal, _____ U.S. _____, 102 S. Ct. 2525, 2535 (1982), citing Griggs, supra, 401 U.S. at 431. (Emphasis in original).

Title VII provides that a victim of discrimination may obtain remedial action such as a back-pay award and/or reinstatement

to the job. 42 U.S.C. §2000e-5(g). Accordingly, this Court has repeatedly interpreted the statutory scheme broadly in order "to honor the remedial purpose of the legislation as a whole," Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982). See also Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

Title VII in no way dictates who must be selected for hiring or promotion. It merely prohibits certain characteristics from being considered in refusing to hire or promote a person. In a case such as this one, Title VII prohibits the denial of job opportunities for a woman attorney solely because she is a woman. The statute does not proscribe a law firm's use of any of the complex, subjective factors which go into choosing who will be made a partner, so long as those factors are not related to the sex of the person being

considered. As noted by one Court in applying Title VII to initial hiring decisions of law firms:

> The common question in both professional and non-professional employment situations is not whether one individual is better qualified than another, but whether that individual is considered less qualified, not because of his or her own worth, but because of discrimination forbidden by Title VII.

Kohn v. Royall, Koegel & Wells, 50 F.R.D. 515, 521 (S.D.N.Y. 1973).

Because Title VII has the broad remedial goal of eliminating discrimination from the workplace, it should be interpreted in this case to allow a challenge to law firm partnership decisions made on the basis of sex.

C. PARTNERSHIP DECISIONS ARE WITHIN THE PROTECTIONS OF TITLE VII.

The Eleventh Circuit took too narrow a view of Title VII when it ruled that

partnership decisions were exempt from that statute's protections. Hishon v. King & Spalding, 678 F. 2d 1022 (11th Cir. 1982). This Court should look to the realities of law firm structure as they relate to Title VII's intent rather than focusing on outmoded notions of the nature of partnerships. Such an examination will demonstrate that Title VII does apply to law firm partnership decisions.

1. Law Firm Partnerships Are "Employers" And The Partners Are "Employees" Of The Partnership For Purpose Of Title VII.

Law firms making partnership decisions are very similar to other employers whose decisions about employees subject to Title VII. Accordingly, the general characteristics of a partnership are not sufficient to take those decisions out of the protective reach of the statute.

The Eleventh Circuit ruled that partners could not be considered "employees"[15] entitled to the protections of the statute because the "very essence of a partnership is the voluntary joinder of all partners with each other." 678 F.2d at 1028. Therefore, the Court refused to accept the analogy between a large law firm and a corporation and concluded that law firm partnership decisions

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15. An "employer" must be a "person" who has fifteen or more "employees" in order to be subject to Title VII. 42 U.S.C. §2000e(b). Partnerships are specifically included in the definition of "person" for this purpose. 42 U.S.C. §2000e(a). Therefore, coverage turns on who can be considered an "employee". The definition of "employee" is not particularly helpful, referring to any "individual employed by an employer." 42 U.S.C. §2000e(f).

It should be noted, however, that this definition of "employee" by no means clearly bars inclusion of partners within its reach. Only certain elected or policy level state government officials are explicitly exempted from the definition. 42 U.S.C. §2000e(f). Since partnerships are specifically included in the definition of "employer," Congress could have exempted partners from coverage as "employees" if it desired. Obviously it has not done so.

cannot be subject to Title VII as are corporate or other employment selections. Ibid.

This approach does not give sufficient credence to the realities of a law firm's deciding if an associate will become a partner. First, it is clear that law firm partnerships are subject to Title VII when they make initial decisions as to whom to hire for associate positions. Kohn v. Royall, Koegell & Wells, supra. The legislative intent of Title VII was to eliminate job discrimination in the broadest way; discrimination in employment of professionals such as lawyers was specifically intended to be reached. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 and n.3 (S.D.N.Y. 1977). See also Bartholet, "Application of Title VII to Jobs in High Places," 95 Harv. L. Rev. 947, 980-983 (1982) (hereinafter, "Jobs in High Places"). Therefore, law firms

themselves are not considered to be a different type of employment environment entitled to special consideration in the statutory scheme.

It is this broad scope of Title VII's reach that belies the notion that law firm partnership decisions are beyond the coverage of the statute. Where Congress intended to exempt certain institutions from Title VII, it did so explicitly. See McLure v. Salvation Army, 460 F.2d 553, 556-557. (5th Cir. 1972) (discussing exemption for certain hiring decisions of religious organizations).

The Court below determined that the voluntary nature of a partnership took it out of Title VII's intended scope. 678 F.2d at 1026-1928. The Court looked to the "essence" of a partnership under state and common law, and determined that Title VII could not negate this voluntary associational aspect with its anti-discriminatory mandates. Id. at 1028

("[W]e are unwilling to dictate partnership decisions under the guise of employment promotions protected by Title VII").

This approach is too deferential to traditional employment relationships which Title VII was aimed at changing. It is not sufficient to look at ways of conducting a business under common law in order to judge a Title VII claim. The passage of Title VII has changed those forms in profound ways; the statute could not possibly eradicate discrimination without doing so.[16]

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16. In its most basic terms, Title VII disturbs the historical doctrine of "at will" employment in which an employer can fire an employee for any reason at any time. Glendon and Lev, "Changes in the Bonding of the Employment Relationship: An Essay on the New Property," 20 B.C. L. Rev. 457 (1979). By injecting certain grounds on which termination decisions cannot be made (e.g. race, sex), the statute radically changed traditional employer/employee relationships.

For example, courts have used Title VII to prohibit businesses from discriminating against one sex because of "customer preference" as to who serves them. Diaz v. Pan American Airlines, 442 F.2d 385 (5th Cir.), cert. denied., 404 U.S. 950 (1971). This clearly places limitations on a business' traditional "freedom" to use certain selection criteria. Similarly, the widespread use of reinstatement to a job for victims of discrimination radically changes the traditional employer/employee relation. See 42 U.S.C. §2000e-5(g).

The concerns which the Eleventh Circuit evidenced toward the voluntary associational aspects of a partnership do not make sense in the context of Title VII.[17]

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17. The District Court went so far as to attach constitutional proportions to the associational rights of law firm partners. See Hishon v. King & Spalding, 24 FEP cases 1303 (N.D. Ga. 1980).

First, this case does not implicate any "freedom of association" rights under the first amendment. The associational interests of a businessperson in a commercial entity such as a law firm is not the same type of political or social association which has been given protection by this Court. See Granti v. Finkel, 445 U.S. 507 (1980); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). See also "Tenure and Partnership as Title VII Remedies," 94 Harv. L. Rev. 457, 468-471 (1980).

Also, discrimination in selection of members has not been allowed even where there are constitutional rights to form an organization in the first place. See Railway Mail Assn. v. Corsi, 326 U.S. 88, 93-94, 98 (1945) (No right to discriminate in union membership even though right to form a labor union exists). See also Note, "Applicability of Federal Antidiscrimination Legislation to

the Selection of a Law Partner," 76 Mich. L. Rev. 282, 312-318 (1977). A strictly commercial undertaking such as a law firm partnership cannot be regarded in the same light as a social club.[18] The size of a large law firm such as King & Spalding here,[19] coupled with the commercial purpose of interaction between firm personnel during business hours, lessens the concern that any individual's associational interest will be harmed by "forced" interaction with another member.

In addition, the realities of law firm practice in this case render concern for associational freedoms misplaced. As

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18. Again, where Congress intended to exempt certain entities from Title VII's reach, it has done so explicitly, such as in the case of bona fide private membership clubs. 42 U.S.C. §2000e(b)(2).

19. As noted by the Eleventh Circuit, King & Spalding had 50 partners and 50 associates in 1982. Hishon, supra, 678 F.2d at 1024.

explained by the Court below, 678 F.2d at 1024, King & Spalding's normal procedure was to hire new lawyers as associates for six years and then consider them for partnership. If associates were not selected to become a partner, they left the firm. The petitioner in this case was employed as an associate in this manner. Therefore, other lawyers in the firm had already "associated" with her for at least six years prior to rejecting her for partnership, with no apparent dire consequence. If partners' associational interests were not harmed by the business contact for the previous six years, those interests should not be permitted to override the mandates of Title VII at such a late stage.

Second, any legitimate concerns about the need to protect the intimate nature of close business relationships in small enterprises has already been provided for in Title VII.

The statute does not cover businesses with fewer than 15 employees, 42 U.S.C. §2000e(b), and thus smaller partnerships where "forced contact" might cause problems are already exempt. See also 110 Cong. Rec. 13088 (1964) (comments of Senator Humphrey that businesses over 25 employees "lose most of whatever intimate, personal character they might have had"); "Applicability of Federal Antidiscrimination Legislation", supra, at 308-309.

Finally, the same kind of "forced contact" which application of Title VII would have to law firm partnerships has been an aspect of remedial orders in other Title VII cases without causing undue concern by courts. The day to day contact which a police officer has with other policemen or policewomen is much more interdependent than the daily contact a lawyer has with his or her partner. Similarly, factory personnel are often

dependent on co-workers for safety and production in a way lawyers are not. "Forced association" has not been an objection to Title VII's applicability in those circumstances. See "Jobs in High Places," supra, at 983-984.

It is apparent, then, that law firm partnerships should not be considered exempt from Title VII because they are any different from other employer/employee contexts. If this were true, then a law firm structured as a partnership could escape the dictates of Title VII, while the same firm operating as a professional corporation could not. The special characteristics of a law firm partnership perceived by the Eleventh Circuit do not stand up to scrutiny.

2. Law Firm Partnership Is A "Term Of Employment" for Title VII Purposes

Even if a law firm partnership is not considered an "employer" when it chooses

partners, the partnership selection is an employment opportunity or term of employment under Title VII.

In Lucido v. Cravath, Swaine & Moore, supra, the Court ruled that the opportunity to be considered for partnership was a "term, condition or privilege of employment" or an "employment opportunity" under Title VII, 42 U.S.C. §2000e(a)(1)-(2), even if it was assumed that a partnership itself is not covered as an employer of its partners by the statute. 425 F. Supp. 127-129. The Eleventh Circuit rejected this argument, with little analysis, concluding merely that "(d)ecisions as to who will be partners are not within the protection of Title VII." 678 F.2d at 1029. Similarly, the Eleventh Circuit rejected Elizabeth Hishon's termination from the firm under its "up or out" partnership selection process as depriving her of employment opportunities. Ibid.

Again, the approach of the Court below distorts the realities of law firm procedure and the intent of Title VII. It makes no sense to forbid a law firm from discriminating when it hires associates, see, e.g., Kohn v. Royall, Wells & Koegel, supra, and then permit a law firm to engage in any kind of discrimination it desires as it brings those associates up through the ranks to partner.

It could hardly be argued that Congress intended to prohibit discrimination only in the lowest rungs of the employment ladder. See generally, "Jobs in High Places," supra. Law firms have historically closed their partnership doors to minorities, even when a few minorities have been hired as associates. See Lions of the Eighties, supra, at 20 (discussing refusal of Wall Street firms to make their Jewish associates partners). See also Smith, "Career Patterns of Black Lawyers in the 1980's," 7 Black L.J. 75, 77 (1981)

(noting low number of black partners in largest firms, and pointing out that blacks who leave firms are often not replaced, lowering the total numbers). It would negate much of the purpose of Title VII's equal opportunity goals if law firms were permitted to create revolving "associate" doors for women and minorities, where those groups could be hired initially, but never promoted to the partnership level.

In addition, the subjective criteria used to select partners is just the sort of subjectivity which Congress was aware could work to the detriment of women and minorities. See Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972). See also Women in Law, supra, at 215-216 (Suggestion that women are held to stricter standards when partnership decisions are made because they do not fit the image of a "partner"). While applicability of Title VII would by no means

remove subjectivity from partnership selection, it would remove illegal factors related to race, sex, religion, or national origin from the subjective criteria. See Lucido, supra, 425 F. Supp. at 129. This is entirely consistent with Title VII's purpose.

D. JUDICIAL REVIEW OF PARTNERSHIP DECISIONS TO ENSURE COMPLIANCE WITH TITLE VII IS APPROPRIATE.

At the essence of the Eleventh Circuit's decision in this case is the notion that a Court is ill-equipped to intervene in the sensitive decisions as to who should be made a partner. See, e.g., 678 F.2d at 1028 ("We are unwilling to dictate partnership decisions under the guise . . . of Title VII"). This deference to partnership selection is unwarranted. Difficulties in evaluating whether a partnership decision is tainted with unlawful discrimination cannot form the basis

of refusing to apply anti-discrimination laws at all.

Courts have repeatedly shied away from using the same standards to evaluate sex or race discrimination in professional jobs that are used in the context of lower level jobs. "Jobs in High Places," supra, at 959-983. This differential treatment of upper level jobs is not supported by the legislative history or language of Title VII. Ibid.

The fear implicit in the Eleventh Circuit's decision is that law firm partnerships are sensitive entities whose innate nature would be ruined by judicial intervention. See, e.g., 678 F.2d at 1028 ("[W]e decline to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individual's decisions to voluntarily associate in a business partnership"). This is akin to the extreme deference afforded tenure decisions in

many academic employment discrimination cases. See Faro v. New York University, 502 F.2d 1229, 1231-1232 (2d Cir. 1974) (Tenure decisions at the University level are "probably the least suited for federal court supervision").

This policy of deference to employment decisions at upper levels has been strongly criticized. As Judge Smith noted in Powell v. Syracuse University, 580 F.2d 1150, 1153 (2d Cir. 1978):

> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in Faro, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964.

See also "Jobs in High Places," supra.

Simply because it appears at first to be so difficult to evaluate whether a professional employment decision was

justified, see Faro, supra, 502 F.2d at 1232, Courts cannot refuse to apply anti-discrimination laws at all. As noted by one commentator, judges are, by virtue of their familiarity with the jobs involved, probably much more able to evaluate whether a promotion decision involving a professor or lawyer was justified than, for example, whether one involving a factory foreman was appropriate. "Jobs in High Places," supra, at 979-980.

More basically, a plaintiff claiming discrimination in law firm partnership selection would have to prove that he or she were "qualified" to become a partner in order to prevail. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973). Thus, the complex factors which go into making a partnership decision would be accounted for in establishing liability under Title VII. See "Tenure and Partnership," supra, at 471-472.

The only factors which could not be taken into consideration would be those forbidden by Title VII - race, sex, national origin, and religion. Therefore, a partnership could still decide that it did not want to promote an associate because she ate too much at firm social functions, or because he wore tennis shorts to the office on a Saturday. So long as those reasons were not a pretext for unlawful discrimination, they could still form the basis for partners to make their extremely selective decisions as to who could be admitted into the partnership. See Board of Trustees v. Sweeney, 439 U.S. 24 (1978). Accordingly, the delicate chemistry of law firm partnerships would not be disturbed except to promote the same goals of equal opportunity applicable in other employment contexts under Title VII.

V. CONCLUSION

Law firm partnerships are very similar to other types of employers subject to Title VII.

They cannot discriminate on the basis of sex in hiring associates; it makes no sense to interpret Title VII in a manner that lets firms discriminate six years later when those associates are considered for partnership. Both the language and intent of Title VII is broad enough to encompass law firm partnership decisions. Therefore, the Eleventh Circuit decision in this case should be reversed.

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